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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 23, 1997

Mr. A. Richard Metzger
Acting Chief
Common Carrier Bureau
Room 500
Federal Communications Commission
1919 M Street N.W.
Washington DC 20554

RE: CC Docket 96-128

Dear Mr. Metzger:

This letter is on behalf of American Network Exchange, Inc. ("ANEI"), one of the carriers required to pay interim payphone compensation under the Commission's orders in the above referenced matter.[1] The purpose of this letter is to confirm ANEI's ability to pay compensation on a per call basis effective as of January 1997 and to request that, to the extent the Commission determines to require carriers to pay compensation for the so-called interim compensation period, ANEI be allowed to remit its portion of payphone compensation on a per-call basis rather than the flat rate per-phone basis. This result is consistent with the D.C. Circuit's recent opinions and will avoid a plainly unjust situation in which ANEI would be required to compensate payphone providers far in excess of the amount of revenue it realizes from the small number of dial around calls it carries.

As you know, Section 276 of the Telecommunications Act of 1996 requires the Commission to prescribe regulations that "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." Accordingly, the FCC determined that interexchange carriers should track and compensate payphone providers on a per-call basis for compensable calls as defined by the Payphone Orders "... through any arrangement they choose, as soon as possible, but no later than one year from

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[1] In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Report and Order*, CC Docket No. 96-128 (rel. Sept. 20, 1996) ("Report and Order"), *Order on Reconsideration*, CC Docket No. 96-128 (rel. Nov. 8, 1996) ("Reconsideration Order"), collectively, the "Payphone Orders", remanded in part, Illinois Public Telecommunications Association v. FCC, D.C. Circuit, Nos. 96-1394 et. al., July 1, 1997; *Supplemental Order* on Motion for Clarification or, Alternatively, for Partial Rehearing, September 16, 1997.

AMERICAN NETWORK EXCHANGE, INC.

100 W. Lucerne Circle • Suite 100 • Orlando, FL 32801-4400 • (407) 246-1234/ Fax: (407) 481-2560

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the effective date of the rules adopted in this proceeding."[2] During the interim year (from November 6, 1996 to November 5, 1997), the Commission adopted a so-called interim compensation plan under which only carriers with revenues over $100 million per year would pay monthly compensation to payphone providers on a flat rate per-phone basis. The amount of each carrier's obligation was calculated based on the carrier's reported annual toll revenues for calendar year 1995.[3] Importantly, in the Reconsideration Order, the Commission recognized that some carriers already have the capability to track payphone calls on a per-call basis and stated that such carriers should have the option of paying on a per-call basis and could petition the Commission for a waiver to adopt such an arrangement.[4]

Under the current interim compensation scheme, ANEI is required to pay independent payphone providers $0.0689597 per month per payphone. When multiplied by the estimated 350,000 independent payphones, ANEI is required to compensate independent payphone providers approximately $24,135.89 per month. Moreover, if the Commission allows the incumbent LECs to participate in the interim compensation scheme retroactive to April 15, 1997, ANEI's compensation obligation will increase fivefold to at least $127,575.00 a month assuming that approximately 1.5 million LEC-owned payphones are included.[5]

Requiring ANEI to compensate payphone owners on a flat rate per-phone basis would be patently unfair because ANEI's overall revenues bear little relationship to the number of access code and

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[2] Report and Order at ¶ 99.

[3] Report and Order at ¶ 119. ANEI notes that although its revenues were over $100 Million in 1995, its 1996 revenues were under $100 million. Thus, ANEI would not be obligated to pay interim compensation based on current, and more appropriate, revenue numbers. Especially in light of the recent D.C. Circuit decision vacating those portions of the Payphone Orders which limited the compensation obligation to carriers whose revenues were in excess of $100 Million, ANEI submits it is inappropriate for the Commission to continue to use 1995 data for this purpose. Thus, to the extent that notwithstanding the court's decision, payphone compensation obligations for the interim period continue to be limited to only certain carriers, ANEI respectfully requests that it be excused from any such compensation obligation.

[4] Reconsideration Order at ¶ 129.

[5] ANEI notes that the issue of whether or not April 15 is an appropriate compensation date is currently the subject of separate Applications for Review filed by the Telco Communications Group, Inc. in this docket. *Public Notice,* DA 97-1398 (rel. July 2, 1997).

subscriber 800 calls carried over its network. ANEI receives a very small percentage of access code and subscriber 800 calls from payphones compared not only to carriers such as MCI and AT&T (which market these services heavily) but also to the total amount of traffic it carries over its network. For example, during the peak month of August 1997, ANEI carried approximately 46,000 dial around calls from all payphones -- both LEC-owned and IPP owned. This represents less than one and one half percent of all calls handled by ANEI during that month. As noted above, according to the Commission's figures, there are approximately 350,000 independent payphones and almost 1.5 million LEC payphones. While ANEI believes these estimates are too low, using these figures and the compensation levels adopted in the Payphone Orders for illustrative purposes, ANEI's flat rate compensation requirements would be at least $127,575.00 per month as compared to approximately $16,000.00 per month on a per call basis. As a result, ANEI would be required to overcompensate payphone providers by more than $115,575.00 per month (or approximately $334,785 for each quarterly compensation period). Even assuming the Commission will adopt a different rate level as a result of its pending proceeding seeking comment on the various issues remanded or vacated by the court,[6] the inequity will remain.

Recognizing the preferability of compensating payphone providers on a per-call rather than a per-phone basis, the Commission has previously granted AT&T, Sprint and Oncor waivers to allow them to pay per-call compensation.[7] In granting the waivers, the Commission expressed its preference for compensating payphone providers on a per-call basis and determined that allowing carriers with the technical capability to do so to compensate payphone owners in that manner furthered the public interest. Significantly, both Operator Communications, Inc. d/b/a Oncor Communications and Telco Communications Group, Inc. have recently filed waiver requests seeking to pay per call compensation rather than per line compensation during the interim compensation period.[8]

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6 *Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding*, Public Notice DA 97-1673, released August 5, 1997.

7 *See, e.g.*, in the Matter of Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, *Memorandum Opinion and Order*, DA 94-1612 (rel. Dec. 29, 1994); In the Matter of Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, *Memorandum Opinion and Order*, DA 97-482 (rel. March 7, 1997).

8 Petition for Waiver of Operator Communications, Inc. d/b/a/ Oncor Communications, filed June 2, 1997; Petition of Telco Communications Group, Inc. for Waiver of Section 64.1301 of the Commission's Rules, filed May 15, 1997.

Allowing ANEI to compensate payphone owners on a per-call basis would ensure both that payphone providers are fairly compensated and that ANEI is not paying more than its share of the burden. It would also ensure a cost-based approach to payphone compensation by basing ANEI's obligation on the actual number of compensable calls from which it benefits, rather than an arbitrary number based on its now superseded toll revenues. As such, the result would be consistent with the D.C. Circuit's opinion, which found arbitrary and capricious the application of a compensation requirement only to carriers with toll revenues in excess of $100 Million "as it did not establish a nexus between total toll revenues and the number of payphone-originated calls". [9]

In short, the Commission has expressed a clear preference for compensating payphone providers on a per-call basis. Especially in light of the Court of Appeals's decision, the Commission should allow those carriers who can do so to pay whatever compensation is ultimately determined to be due and owing for the interim period on a per call basis.[10] Accordingly, ANEI requests that, when the Commission issues its anticipated order in this proceeding, it be allowed to pay whatever interim compensation is determined to be due on a per call rather than a per phone per month basis.

Respectfully submitted,

AMERICAN NETWORK EXCHANGE, INC.

By: ______________________

Amy S. Gross
Its Attorney

100 W. Lucerne Circle, Suite 100
Orlando, FL 32801-4400
Phone: (407) 246-6488
Fax: (407) 481-2560

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9 *Supplemental Opinion* at 4.

10 ANEI requests that, to the extent that the Commission grants either of the waiver petitions already on file with the Commission pursuant to Section 1.3 of the Commission's rules, it also be granted a waiver of Section 64.1301 for good cause shown.